

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Wireless Telecommunications Bureau)	
Seeks Comment on Proposal to Revise)	
Multichannel Multipoint Distribution)	DA 02-2732
Service and the Instructional)	RM-10586
Television Fixed Service Rules)	

To: Wireless Telecommunications Bureau

COMMENTS OF DALLAS MDS PARTNERS

James A. Stenger
Eric J. Schwalb
TROUTMAN SANDERS LLP
401 Ninth Street, NW, Suite 1000
Washington, DC 20004
(202) 274-2801

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Its Attorneys

SUMMARY

As the Commission ponders ways in which it can aid the wireless industry in deploying next generation technologies, it must also remain cognizant of the fact that it in so doing it should neither favor one class of licensees over another nor remove the protections it has provided certain licensees. The “Proposal for Revising the MDS and ITFS Regulatory Regime” (“Proposal”), appears at first blush to be a step in the right direction. It not only shifts the licensing regime in the MDS/ITFS band to geographic service areas, but also de-interleaves the band to provide licensees with contiguous bands of spectrum that will permit licensees to provide next generation services in the band.

The Proposal is not, however, without its problems. Even a cursory review of the plan’s provisions makes clear that E and F Group licensees will be disadvantaged to the benefit of ITFS licensees, who are raised in various ways to a pedestal not contemplated by, and perhaps antithetical to, recent Commission orders. This is done in primarily two ways. First, the Proposal requires commercial, E and F Group licensees to contribute a quarter of their channels to a Mid Band Segment, which has as its main purpose the provision of dedicated spectrum for ITFS, without ever establishing that the presence of these channels is necessary to furthering the other goal of the band segment, which is to serve as a guard band between the Upper and Lower Band Segments. Second, the Proposal would extinguish, without justification, the grandfathering provisions in the E and F Group bands, upon which licensees have depended for many years.

The Proposal also includes various provisions that serve to disadvantage small licensees to the benefit of large operators. First, the Proposal would require all licensees in a market to contribute to the costs of an ITFS transition in the band, even where the transition is at the

behest, and for the sole benefit, of large commercial lessees of the ITFS licenses. Second, the Proposal's transition rules operate to limit the type of services for which a single license may be used, thereby limiting the single licensee's ability to offer equivalent services vis-à-vis a licensee possessing several licenses. Finally, the Proposal appears to require actual, field measurements of interference, which is impractical and expensive for all licensees, but especially small licensees.

In the comments below, Dallas MDS Partners offers suggestions for ways in which the Proposal may meet its goals, without disadvantaging E and F Group licensees, and without disproportionately burdening small licensees in the transition to follow. Dallas MDS Partners respectfully requests the Commission consider these comments as it determines the propriety of issuing a proposed rulemaking on this matter.

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Dallas MDS Partners (“Dallas MDS”), by its undersigned counsel, hereby respectfully submits comments to the above-referenced Public Notice issued by the Commission on October 17, 2002. Dallas MDS is a Channel E licensee in the Dallas, Texas area. Dallas MDS appreciates the efforts of both the Wireless Telecommunications Bureau (“WTB”) and the proponents of “A Proposal for Revising the MDS and ITFS Regulatory Regime” (the “Proposal”) for advancing the issue of overhauling the Commission’s Rules governing the Multipoint Distribution Service (“MDS”), Multichannel Multipoint Distribution Service (“MMDS”) and Instructional Television Fixed Service (“ITFS”). Although supporting the concept of eliminating the interleaved nature of the band and the transition to geographic service areas (“GSAs”), Dallas MDS does not believe that the Proposal in its present form should be adopted. The Proposal disadvantages E and F Group licensees by unnecessarily including them in a buffer band between mobile operations, by lifting grandfathering protections afforded the E and F Group licensees, and by favoring large licensees over small.

I. The Proposal Unnecessarily Includes E And F Group Licenses In The Mid Band Segment

More than a year after the Commission, at the behest of the wireless cable industry, gave the industry the authority to convert its spectrum to mobile use to effectuate the introduction of new, advanced wireless services, including third generation wireless systems,¹ the Wireless Communications Association (“WCA”), the National ITFS Association (“NIA”) and the Catholic Television Network (“CTN”) (hereinafter “the Proponents”) have put forth a compromise plan that attempts to create the opportunity for third generation services, while protecting antiquated ITFS services. The plan proposes to remove site-by-site licensing in favor of flexible GSAs, and to de-interleave channels to create contiguous blocks of spectrum. Specifically, the proposal would create a tripartite band, including a Lower Band Segment (LBS), a Mid Band Segment (MBS) and an Upper Band Segment (UBS).

In the LBS and UBS, licensees will be able to provide two-way mobile communications, including, presumably, third generation services. The MBS, however, will be used for two purposes. First, it will be used by ITFS licenses to continue to broadcast television programming to their schools and students. Second, the MBS will serve as a guard band between the mobile services offered in the LBS and UBS.

What is not clear from the Proposal, however, is why E and F Group licensees, who operate their licenses for commercial, not ITFS, use, should be required to contribute a quarter of each licensee’s spectrum (one of every four channels) to the MBS.² As to the first role of the MBS, the Proponents readily admit that their plan to create the MBS arises in large part from

¹ Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Service to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, *First Report & Order*, 16 FCC Rcd 17,222 (Sept. 6, 2001).

² Worse, only the segment in the MBS will be allocated a full six MHz; all others will be reduced by 1.5 MHz to serve as a guard band.

ITFS licensees who believe it is in their best interests to preserve a microwave television service that the Proponents elsewhere allege has been a failure. Dallas MDS respectfully submits that if the ITFS licensees wish to pursue such a plan, and if the Commission finds such a venture worthy, it should be the ITFS licensees who should donate their spectrum to the MBS, not E and F Group licensees who are only interested in the technologies of the future such as two-way mobile computing and communications and have, therefore, no interest in being present in the MBS.

As to the second role of the MBS, which is to serve as a form of protection between the mobile services in the LBS and UBS, Dallas MDS questions whether the amount of spectrum required to perform this function necessitates the presence of E and F Group licensees. The Proposal anticipates 42 MHz in the MBS, as well as 6 MHz from each of the J and K guard bands, totaling 54 MHz of protection between the LBS and UBS. Dallas MDS believes that, given the 12 MHz of spectrum provided by the J and K bands, the MBS may need only an additional 30 MHz of spectrum, for a total of 42 MHz, to keep the LBS and UBS separate. Thus, Dallas MDS suggests that the WTB investigate further to determine if 54 MHz is truly required for separation between the UBS and the LBS. If it is not, and 30 MHz will suffice, then Dallas MDS sees no reason behind forcing the E and F Group licensees to give a quarter of their channels to the MBS. Accordingly, they should not be included in the MBS, but should receive channels only in the UBS and LBS.

II. The Commission Should Not Eliminate The Grandfathering Provisions On The E And F Channels.

The Proposal urges the Commission “to eliminate the current policy of restricting the technical modifications that a so-called ‘grandfathered’ E or F Group ITFS licensee is permitted

to make.”³ The Proponents claim that the purpose of the grandfathering provisions, passed in 1983, was simply to “minimize the adverse interference impact that ITFS licensees on the E and F Group channels granted prior to reallocation of those channels to MDS would have upon MDS lottery winners.”⁴ This is only partly correct.

The 1983 Commission proceeding to which the Proponents cite also established that “[n]o assignments [of grandfathered E/F channels], other than *pro forma* assignments...will be permitted.”⁵ As the *Reallocation Order* made clear, the purpose of this prohibition on assignments and modifications was to protect the interests of the public and of incumbent operators and to promote the conversion to MDS licenses through the forfeit of unused ITFS licenses. Thus, ITFS licensees granted grandfather status could use their licenses, or could forfeit them, but they could not assign them or otherwise modify them. It is this provision the Proponents seek to eliminate in their Proposal.

By couching the rescission of the grandfather provisions solely as an interference issue, the Proponents claim that the myriad restrictions posited in the Proposal “are amply protective of MDS and ITFS licensees alike,” thereby making the grandfather provisions no longer necessary.⁶ Although the Proposal’s interference protections are considerable, the impact of a lift of the grandfathering provisions has two far more profound effects on the MDS/ITFS relationship, which the Commission must consider before removing its grandfathering rules.

The first problem with lifting the grandfathering provisions is that such an action would elevate ITFS licensees to a status not contemplated by the *Reallocation Order*. As noted above,

³ Proposal at 51.

⁴ *Id.*

⁵ Amendment of Parts 2, 21, 74, and 94 of the Commission’s Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Services, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Services, *Report and Order*, 94 FCC 2d 1203, ¶ 85 (1983)[hereinafter the “*Reallocation Order*”].

⁶ Proposal at 51.

the Commission anticipated, and promulgated rules to spur, the forfeiture of generally unused ITFS licenses. In the Proposal, however, the Proponents would have the Commission resurrect the ITFS licensees by providing them with additional rights, such as the right to split the convergence of the concentric coverage circles (the so-called “football”) between ITFS and MDS licensees, that they may not currently enjoy.

A second and related problem with the elimination of the grandfathering provision is that it permits ITFS and other licensees to do by administrative fiat what they have been heretofore unable to accomplish, namely, the transfer of ITFS licenses to commercial carriers without losing the priority rights of the ITFS licensee. Like many MDS licensees, Dallas MDS’s operations are subject to protection of certain receive sites of an ITFS licensee, none of which are currently in operation, which preceded Dallas MDS’s operations in the Dallas area.⁷ If the ITFS licensee were to forfeit its licenses, as anticipated in the *Reallocation Order*, the licenses would then become available to the BTA licensee in the Dallas-Ft. Worth area. The purchasing licensee, however, would receive its licenses subject to the incumbent, and now first-in-time, licensee, Dallas MDS.

The ITFS and BTA licensees have avoided this course of action, however, because it provides no compensation to the former and an encumbered license to the latter. Thus, for several years the ITFS licensee has attempted instead to sell its licenses, including its first-in-time rights, to the BTA licensee. To date, Dallas MDS has defended against this inappropriate assignment, noting that the any non- *pro forma* assignment of an ITFS license is strictly prohibited.

⁷ Dallas MDS is involved in an on-going dispute with both an ITFS licensee and its presumptive suitor. Dallas MDS maintains that the ITFS licensee does not validly possess its licenses, and may not assign its licenses for profit to a commercial carrier. Nothing contained in these comments should be construed as altering, limiting or waiving any

With the Proposal, the Proponents now ask the Commission to dispose of the very rules that protect licensees like Dallas MDS from losing their potential for first-in-time priority. Without the grandfathering provision, ITFS licensees would be able to sell their licenses to BTA licensees, who would assume their priority status, over companies like Dallas MDS who have patiently waited to gain priority.

Dallas MDS, no less others similarly situated, entered the MDS field cognizant of the protections provided, and opportunities afforded, MDS licensees in the *Reallocation Order*. Accordingly, Dallas MDS has operated in accord with the Commission's Rules by protecting the ITFS licensee and has waited to become the primary licensee, including gaining control of the football, once the ITFS licensee ceases operations. Under the Proposal, however, Dallas MDS would lose all of these rights. If the term "grandfathering" is to have any meaning, the Commission must allow its grandfathering provisions to endure.

Notably, the Proponents have offered no rationale for removing the grandfather provisions, other than to label the restrictions as "underbrush" that no longer serve any purpose. As noted above, however, the provisions do serve a valid purpose and must not be eliminated for the sole purpose of administrative housecleaning.

III. MDS Licensees Should Not Pay For ITFS Transition That Primarily Benefits Commercial Lessees.

To remedy what is referred to as a "free-rider" problem that supposedly slows the band-clearing process required in the proposed transition, the Proposal asks the Commission to "mandate reimbursement of the party that pays to relocate a fixed microwave service link when others subsequently benefit."⁸ As an initial matter, Dallas MDS asks the Commission to specify

of the claims Dallas MDS maintains against these parties in *Application for Higher Education For Authority to Assign ITFS Stations KWU-29, Fort Worth, Texas, and KWU-30, Dallas, Texas*, File No. 50423-CM-AL(2)-98.

⁸ Proposal, Appendix B at 28.

what “benefit” is required to trigger the proposed compensation mechanism. Dallas MDS does not believe, for example, that a party moved from interleaved channels to contiguous channels has received such a benefit as to require it to pay the transition costs of ITFS licensees and their lessees, who may receive a far more considerable benefit.

Dallas MDS is also concerned that licensees may be required to pay the transition costs of an ITFS licensee, even when that licensee has a commercial lessee that stands to be the primary beneficiary of such a transition. Thus, Dallas MDS suggests that only where an ITFS licensee does not have a commercial lessee, should other licensees be required to participate in the reimbursement of the expenses of transition. This suggestion, however, raises the specter of a lessee postponing its dealings with an ITFS licensee until after the transition is funded so as to avoid paying the costs of the transition. Therefore, Dallas MDS further suggests that if, within a window of two years after an ITFS licensee spurs a transition, a commercial party leases an ITFS license, that party should be required to refund to the other parties their pro rata share of reimbursement costs.⁹

IV. The Commission Should Ensure Its Rules Are Pro-Competitive.

In addition to the rescission of the grandfathering rules discussed above, which would permit commercial licensees to circumnavigate the *Reallocation Order*, the Proposal also has several technical rules that appear to benefit large, commercial licensees who control entire markets. Although these rules may be no more than a reflection of the fact that the industry is by and large dominated by sizable commercial carriers, the Commission should consider the extent

⁹ Dallas MDS also is concerned with the actual cost of reimbursement, the fact that no caps exist on such an amount, and the notion that penalties may follow for licensees that cannot afford such costs. The Commission should be wary of large, commercial licensees wittingly driving up costs of a large transition, and subsequently requesting pro rata reimbursement from other licensees in efforts to drive the latter out of the market. Dallas MDS suggests that it would be unfair to penalize a licensee for its inability to pay its pro rata share of a transition, especially where the licensee receives no cognizable benefit.

to which the Proposal further disincentives small licensees, like Dallas MDS, from competing in the industry.

For example, the Proposal's transition rules operate to limit the type of services for which a single license may be used. Specifically, the Proposal posits "that when the LBS is used for FDD communications, it be restricted to subscriber-to-base traffic and that when the UBS is used for FDD communications, it be restricted to base-to-subscriber traffic."¹⁰ As such, a licensee with only one license, such as Dallas MDS, who receives in the transition all of its segments in one portion of the band, is limited in the type of services it may provide. This limitation does not exist, however, to a licensee possessing several licenses, where different licenses will have segments in each portion of the band, permitting all forms of operation.

One response to this dilemma, of course, is for small licensees to swap segments with other market licensees. In practice, however, where one large, commercial entity possesses the vast majority of licenses in a given market, that licensee has no incentive to trade with the smaller licensee. More likely, the larger operator will use its size advantage to purchase at a deflated price the remaining, limited use license. The Commission should consider mechanisms by which single licensees may be able to acquire the licenses it needs to compete service-for-service in a given market.

V. The Commission Should Permit Interference To Be Measured By Propagation Analysis.

Dallas MDS generally supports the signal limits posited by the Proposal. Dallas MDS is concerned, however, with language that refers to the fact that "measurements are to be taken,"¹¹ believing that such language contemplates an actual, field measurement of signal strength. Dallas MDS believes that such a requirement would be onerous on licensees and is, moreover,

¹⁰ Proposal at 16.

unnecessary. Instead, Dallas MDS suggests that the Commission permit a specific, terrain-based propagation study to be used in lieu of actual measurements.

Dallas MDS requests that the Commission identify what propagation study should be used. In the past, in various contexts, the Commission has relied upon the so-called R-6602 model. As the Commission has noted, however, R-6602 curves “cannot be used to predict with any accuracy the field which would be established by any specific operation over a particular path to an equally specific area, even when the terrain correction factor is employed.”¹² This is principally because R-6602 does not use a working coverage model. Dallas MDS suggests that Longley-Rice, which utilizes actual, 30-meter data, provides a more accurate interference analysis than R-6602. Regardless of which model is preferred by the Commission, Dallas MDS suggests that by identifying a single measure, the Commission could ease the resolution of interference disputes for all parties.

Conclusion

Dallas MDS supports the end to the interleaving of the MDS/ITFS band and the transition to geographic service area licensing. Dallas MDS does not support, however, the mandatory inclusion of commercial, E and F Group licensees in the Mid Band Segment, believing that the band has sufficient spectrum to separate the mobile operations destined for the bands above and below it. Dallas MDS also cannot support any provisions that require licensees to pay the costs of expensive transitions begun by, and for the benefit of, commercial ITFS lessees, who stand to gain the most from such a shift, and who should solely be responsible for paying such costs. Finally, Dallas MDS urges the Commission to maintain the restrictions on grandfathered E and F

¹¹ Id. at 27.

¹² *Development of VHF and UHF Propagation Curves for TV and FM Broadcasting*, FCC Report R-6602, at 17 (Sept. 7, 1966).

Channel licensees, believing such protections in keeping with Commission precedent and necessary to the equitable treatment of incumbent licensees like Dallas MDS.

Respectfully submitted,

DALLAS MDS PARTNERS

/s/ James A. Stenger

James A. Stenger

Eric J. Schwalb

TROUTMAN SANDERS LLP
401 Ninth Street, NW, Suite 1000
Washington, DC 20004
(202) 274-2801

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